RECENT DECISIONS.

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BANKRUPTCY — PREFERENCES — RIGHTS OF VENDOR UNDER CONDITIONAL SALE.—A contract of conditional sale was entered into in November, 1913, in a jurisdiction where the law required such a contract to be recorded in order to be valid against creditors. It was recorded on May 15, 1912, at which time the vendor had reasonable cause to believe the purchaser was insolvent, and within four months thereafter the purchaser became bankrupt. The chattels included in the sale were sold by order of a referee and the suit was brought to determine the disposition of the proceeds of the sale. *Held,* for the vendor. The recording did not operate as a preferential transfer, and the right of a trustee as a creditor holding a lien attaches at the time of the filing of the petition. *Bailey* v. *Baker Ice Machine Co.* (U. S. 1915) 36 Sup. Ct. Rep. 50. Rehearing denied Jan. 10, 1916.

The court recognizes and follows the distinction heretofore laid down between chattel mortgages and conditional sales in holding that the recording of the agreement does not operate as a preferential transfer of property within the meaning of the Bankruptcy Act. For a discussion of the principles involved see 13 Columbia Law Rev., 641.

Under § 47-a (2) of the Bankruptcy Act, as amended in 1910, the trustee is vested not only with the title of the bankrupt, but with the rights of a creditor holding a lien by legal process. See 13 Columbia Law Rev., 158. Up to the present it has been uncertain as to what time the trustee was to be regarded as being vested with these rights, but the principal case settled the law in this respect, refusing to permit retroactive effect to the rights acquired at the time of filing the petition.

BANKS AND BANKING—MISAPPROPRIATION OF TRUST FUNDS—LIABILITY OF BANK.—An executor deposited to his personal account in the defendant bank checks drawn by him upon the estate's deposit in another bank. Some of the money so deposited was used to discharge his personal obligations to the defendant bank, and part to discharge personal obligations to other parties. In a suit on behalf of the beneficiary, *held,* Scott, J. dissenting in part, the defendant was put on notice by the form of the checks, and is liable to the estate for such misappropriations. *Bischoff* v. *Yorkville Bank* (N. Y., App. Div. 1st Dept. 1915) 156 N. Y. Supp. 563.

It is well settled that a bank receiving checks drawn to a fiduciary's order upon trust funds, in payment of the fiduciary's individual debt, is liable to the *cestui* if there has been a misappropriation of such moneys. *Rochester & C. T. R. Co.* v. *Paviour* (1900) 164 N. Y. 281, 58 N. E. 114; *Allen* v. *Puritan Trust Co.* (1912) 211 Mass. 409, 97 N. E. 916; *Ward* v. *City Trust Co.* (1908) 192 N. Y. 61, 84 N. E. 585; see 4 Columbia Law Rev., 213. This liability is based upon the actual knowledge of the misappropriation, or notice of such facts as require

investigation by the bank as to the authority of the fiduciary to so use the funds. The mere deposit of such paper by the fiduciary in his individual account, when the bank is not benefited thereby, is not generally considered sufficient to render the depositary liable for any misappropriation, since such action is as susceptible of an innocent interpretation as otherwise. *Goodwin* v. *American Nat. Bank* (1881) 48 Conn. 550; *Batchelder* v. *Central Nat. Bank* (1905) 188 Mass. 25, 73 N. E. 1024; *Safe Deposit & Trust Co.* v. *Diamond Nat. Bank* (1900) 194 Pa. 334, 44 Atl. 1064; see 10 Columbia Law Rev., 162; 13 Columbia Law Rev., 727. Some jurisdictions, including the lower New York courts, have refused to follow these authorities and have held the banks to strict accountability in such circumstances. *Clement Nat. Bank* v. *Connolly* (1914) 88 Vt. 55, 90 Atl. 794; *Niagara Woolen Co.* v. *Pacific Bank* (N. Y. 1910) 141 App. Div. 265, 126 N. Y. Supp. 890; *Newman* v. *Newman* (N. Y. 1914) 160 App. Div. 331, 145 N. Y. Supp. 325; see *Buckley* v. *Lincoln Trust Co.* (1911) 72 Misc. 218, 131 N. Y. Supp. 105. While this doctrine puts an insuperable burden on the banking world and seems insupportable on theory, see 11 Columbia Law Rev., 428, yet the decision in the principal case may be justified on the ground that the defendant was put on notice as to the use of the entire fund by the payment, in several instances, of the fiduciary's debt to the bank. *Cf. Farmers' Loan & Trust Co.* v. *Fidelity Trust Co.* (1898) 86 Fed. 541; *contra, Allen* v. *Puritan Trust Co., supra.*

BANKS AND BANKING—VOLUNTARY LIQUIDATION—LIQUIDATING COMMITTEE.—A national bank went into voluntary liquidation under the provisions of the National Bank Act, Rev. Stat. § 5220, and appointed a liquidating committee to wind up its corporate affairs. A stockholder of the bank brought action for waste of assets through the mismanagement of the defendants, who constituted a majority of the directors. To a complaint alleging substantially the foregoing facts a demurrer was interposed on the grounds that the plaintiff had failed to allege a demand upon the liquidating committee. *Held,* the motion to overrule the demurrer should be granted, since the appointment of a liquidating committee did not supersede the duties of the directors of the bank. *Planten* v. *Nat. Nassau Bank* (Sup. Ct. 1916) 157 N. Y. Supp. 31. See Notes, p. 333.

CARRIERS—EXTENDING LIMITATION OF LIABILITY UNDER THE HEPBURN ACT TO WAREHOUSING.—The plaintiff shipped goods under a bill of lading which provided that, in consideration of the reduced rate, every service to be performed thereunder should be subject to all conditions in the bill. Under the bill of lading liability was limited to $10, the declared valuation. The goods were not called for by the assignee, and a month after arrival certain of them to the value of $2792 were lost through the negligence of the defendant at its warehouse. *Held,* the limitation of liability extended to the warehousing of the property. *Cleveland etc. Ry.* v. *Dettlebach* (1916) 239 U. S. 588, 36 Sup. Ct. 177.

A carrier is subjected to a higher degree of care than an ordinary warehouseman. Dobie, Bailments & Carriers, § 116. When a carrier has custody of the goods, although its liability as carrier has ceased, it is under a duty as warehouseman to take ordinary care of the prop-

erty in its charge. *Merchants' Dispatch & Trans. Co.* v. *Merrian* (1887) 111 Ind. 5, 11 N. E. 954; *Lane* v. *Boston & Albany R. R.* (1873) 112 Mass. 455. Accordingly, if the property is injured thereafter without the negligence of the carrier acting as warehouseman, it is not liable. *Bryan* v. *Chicago & Alton R. R.* (1912) 169 Ill. App. 181; see *Seaboard Air Line Ry.* v. *Harper Piano Co.* (1912) 63 Fla. 264, 58 So. 491. In the principal case the court below argued that the custody and protection of goods as warehouseman was a distinct service from transportation and the reduction in rate for transportation was, therefore, no consideration to support the limitation of liability for warehousing. However, as the bill of lading provided that every service to be performed thereunder should be subject to the conditions named, and as the Hepburn Act 34, Stat. 584 c. 3591 enlarged the definition of the term "transportation" to include all instrumentalities in connection with the receipt and delivery of the property, the view of the principal case that the lower rate was consideration for the whole contract is clearly correct.

CARRIERS—INTERSTATE COMMERCE—CARMACK AMENDMENT—LIABILITY OF INITIAL CARRIER FOR DELAY.—Through the negligence of the connecting carrier a shipment of fruit was delayed, whereby the shipper lost the market. He sued the initial carrier under the Act of June 29, 1906, c. 259, § 7, known as the Carmack Amendment, for the "loss, damage, or injury to such property". *Held*, he could recover. *New York, Phila. & Norfolk R. R.* v. *Peninsula Exchange* (U. S. Sup. Ct., Oct. Term, 1915, No. 137, Jan. 24, 1916).

In the absence of a statute the connecting carrier alone would be liable for a delay caused by its negligence, 10 Columbia Law Rev., 568, and the liability of the initial carrier must therefore depend upon the Carmack Amendment. If the goods are perishable, and delay causes deterioration, there is clearly "damage or injury" to the property within the statute; and even where the property is uninjured, and the delay merely causes a loss of market, as in the principal case, a recovery against the carrier is generally allowed, though not strictly within the statute, as being within its spirit. *Norfolk etc. Exchange* v. *Norfolk etc. R. R.* (1914) 116 Va. 466; *Southern Pac. R. R.* v. *Lyon & Co.* (Miss. 1914) 66 So. 209. Prior to the act, the shipper labored under a double disability due partly to his ignorance of facts peculiarly within the knowledge of the carrier, and partly to the heavy expense entailed by successive suits in a distant jurisdiction. To relieve this situation and secure to the shipper unity of responsibility as well as of transportation, the Carmack Amendment was passed. See *Atlantic C. L. R. R.* v. *Riverside Mills* (1911) 219 U. S. 186, 31 Sup. Ct. 164; *Adams Exp. Co.* v. *Croninger* (1915) 226 U. S. 491, 33 Sup. Ct. 148. The initial carrier is now regarded as making the connecting carrier his agent, *Atlantic C. L. R. R.* v. *Riverside Mills, supra,* 205, 206, and it would be a very narrow construction of the act to limit this agency to the single circumstance of physical injury to the property. Negligence of the connecting carrier whether resulting in loss of the property, or in mere delay, is equally a breach of the carrier's common law duty, Wyman, Public Service Corporations, § 901, and within the intent of Congress in passing the Carmack Amendment. *Fort Smith & W. R. R.* v. *Awbrey & Semple* (1913) 39 Okla. 270, 134 Pac. 1119; *Pecos & N. T. Ry.* v. *Cox* (Tex. Civ. App. 1912) 150 S. W. 265; but see *Byers* v. *Southern Exp. Co.* (1914) 165 N. C. 542, 21 S. E. 741.

CARRIERS—NEGLIGENT DELAY FOLLOWED BY INJURY BY ACT OF GOD—LIABILITY.—Goods were injured in transit by an unprecedented flood which they would have avoided but for the defendant carrier's previous negligent delay in transporting them. *Held,* the loss was due to an act of God and the carrier was not liable. *Seaboard Air Line Ry.* v. *Mullin* (Fla. 1915) 70 So. 467.

There is no doubt that a carrier is exonerated from liability in cases where an act of God is the proximate cause of the loss and the carrier is free from negligence. 4 Elliott, Railroads (2nd ed.) § 1455. But there is considerable conflict of authority as to the carrier's liability where the goods would not have been exposed to the unforeseen act of God but for the carrier's previous negligent delay. A number of cases, based upon two early New York decisions, *Michaels* v. *N. Y. C. R. R.* (1864) 30 N. Y. 564; *Read* v. *Spaulding* (1864) 30 N. Y. 630, hold that, unless the carrier is itself entirely free from fault, it may not claim exemption; and that its negligence is the proximate cause of the loss. *Bibb Broom Corn Co.* v. *Atchison T. & S. F. Ry.* (1905) 94 Minn. 269, 102 N. W. 709; *Green-Wheeler Shoe Co.* v. *Chicago R. I. & P. Ry.* (1906) 130 Iowa 123, 106 N. W. 498. However, it would seem that, in such cases, the proximate cause of the loss is the act of God, and that the negligent delay, though it furnishes the occasion for the loss, is too remote to be considered a proximate cause. Nor is the loss a natural and probable consequence of the negligence which should have been forseen or provided against. This view, which is taken by the principal case, is supported by the weight of authority. *Morrison* v. *Davis & Co.* (1852) 20 Pa. 171; *Empire State Cattle Co.* v. *Atchison T. & S. F. Ry.* (C. C. 1905) 135 Fed. 135; *Moffatt Commission Co.* v. *Union Pacific Ry.* (1905) 113 Mo. App. 544, 88 S. W. 117; *Rodgers* v. *Missouri Pacific Ry.* (1907) 75 Kan. 222, 88 Pac. 885.

CHATTEL MORTGAGES—LIABILITY OF LANDOWNER TO CROPPER'S MORTGAGEE FOR CONVERSION OF CROPS.—A chattel mortgagee of a cropper brought claim and delivery against the landowner who, after releasing on the mortgage his interest in the cropper's share, took possession of the entire crop and converted it. *Held,* the defendant had title and right to exclusive possession and the plaintiff's remedy is in equity. *Malcolm Mercantile Co.* v. *Britt* (S. C. 1915) 87 S. E. 143.

The relation created by a contract to farm on shares usually falls short of that of landlord and tenant and is generally that of master and servant, the servant having no title to the crops before division, but sometimes having a lien for his wages. *Smyth* v. *Tennison* (1914) 24 Cal. App. 519, 141 Pac. 1059; *Valentine* v. *Edwards* (1914) 112 Ark. 354, 166 S. W. 531; *Willard* v. *Cox* (1913) 9 Ala. App. 439, 63 So. 781. And it is not one of partnership. *Texas Produce Exchange* v. *Sorrell* (Tex. Civ. App. 1914) 168 S. W. 74; *L. A. Blouin Co.* v. *Herbert* (1914) 134 La. 423, 64 So. 230. When the cropper is a servant, having neither title nor right to possession, he cannot maintain replevin or trover against the landowner. Wells, Replevin, 105. But a release by the landowner of his interest in the cropper's share made either before or at the time of the mortgage would seem to give the latter title to his own share and, before division, make him co-tenant with the landowner. And upon conversion of confused goods by a co-tenant, the other tenant in common may in some jurisdictions maintain replevin, *Schwartz* v. *Skinner* (1873) 47 Cal. 3; see *Manti etc. Bank* v. *Peterson* (1908) 33 Utah 209, 93 Pac. 566, and certainly trover.

Burdick, Torts (3rd ed.) § 438; *Doyle* v. *Bush* (N. C. 1915) 86 S. E. 165; *Johnson* v. *McFry* (Ala. 1915) 68 So. 716. In the principal case, as the statutory action of claim and delivery is a combination of replevin and trover, *Reynolds* v. *Philips* (1905) 72 S. C. 32, 51 S. E. 523, the plaintiff, since he succeeded to the rights of the cropper, should have been allowed to maintain his action, provided the release by the landowner was made either prior to or contemporaneous with the giving of the mortgage, a controlling point not made to appear in the principal case.

CONFESSIONS—VOLUNTARINESS—QUESTION FOR COURT OR JURY.—When a confession was offered in evidence a question of fact arose as to whether it was voluntary or not. *Held,* the confession should be admitted and the jury allowed to determine the fact and what credit they will give the statement made. *United States* v. *Oppenheim* (D. C., N. D., N. Y. 1915) 228 Fed. 220.

Since the voluntariness of a confession properly affects only its admissibility in evidence, it should on principle be determined solely by the court as a question of fact on the *voir dire,* while the jury should judge what weight shall be attached to it as evidence, Wigmore, Evidence, § 861, but only a minority of courts have accepted this view. *Burton* v. *State* (1895) 107 Ala. 108, 18 So. 284; *State* v. *Duncan* (1876) 64 Mo. 262; *State* v. *Spanos* (1913) 66 Ore. 118, 134 Pac. 6; *Regina* v. *Garner* (1848) 1 Den. Cr. C. 329; *Regina* v. *Moore* (1852) 2 Den. Cr. C. 522. The weight of authority at present is represented by those jurisdictions which have adopted the peculiar rule that in the first instance the court must decide the confession voluntary and therefore admissible, but must leave the question of voluntariness again with the jury with appropriate instructions to disregard it completely if they find it involuntary, *State* v. *Armigo* (1913) 18 N. M. 262, 135 Pac. 555; *People* v. *Roach* (1915) 215 N. Y. 592, 109 N. E. 618; *Commonwealth* v. *Preece* (1885) 140 Mass. 276, 5 N. E. 494; see *Belcher* v. *State* (1913) 71 Tex. Cr. 046, 161 S. W. 459, although it is not reversible error to refuse to leave the question with the jury if there is no substantial conflict in the evidence. *State* v. *Inman* (1905) 70 Kan. 894, 79 Pac. 162. Not only does sound principle require that the issue of voluntariness be settled once for all by the court, but the defendant also is undoubtedly prejudiced by the admission of the confession to the jury at all, even though they are properly instructed to disregard it under the prescribed alternative. While the authorities cited in the principal case do not warrant its holding, *Wilson* v. *United States* (1896) 162 U. S. 613, 16 Sup. Ct. 895; *Commonwealth* v. *Preece, supra,* there is some support for the proposition there advanced that when there is a conflict in the evidence, the court may not pass on the admissibility of the confession, but must submit the whole question to the jury, which then decides on its voluntariness in the first instance, as well as the weight to be given it. *Commonwealth* v. *Epps* (1899) 193 Pa. 512, 44 Atl. 570.

CONSTITUTIONAL LAW—POLICE POWER—LIMITATION OF OCCUPATION—UNDERTAKERS.—The defendant was indicted for engaging in business as an undertaker without a license. A statute provided that no one might take the examination for a license till he had served two years as apprentice to a licensed undertaker. The court sustained a demurrer to the indictment, two judges dissenting, on the ground that

the statute was unconstitutional. *People* v. *Harrison* (App. Div., 1st Dept., 1915) 156 N. Y. Supp. 679.

The business of undertakers is so connected with the public health that it may be subjected to reasonable regulation under the police power. *Keller* v. *State* (1914) 122 Md. 677, 90 Atl. 603; *People* v. *Ringe* (1910) 197 N. Y. 143, 90 N. E. 451. But statutes which require undertakers to be skilled in embalming are unconstitutional, since skill in embalming bears no obvious relation to competency as an undertaker. *People* v. *Ringe, supra*; *State* v. *Rice* (1911) 115 Md. 317, 80 Atl. 1026; see *Wyeth* v. *Board of Health* (1909) 200 Mass. 474, 86 N. E. 925. Similarly, in the case of railways, a Texas statute which made two years' service as brakeman the sole and final test of fitness to be a conductor was declared void, since competency alone was to be sought, and the legislature cannot provide that it shall be attained in one particular way. *Smith* v. *Texas* (1914) 233 U. S. 630, 34 Sup. Ct. Rep. 681; *cf. Cleveland etc. R. R.* v. *State* (1903) 26 Ohio Cir. Ct. 348. The Texas statute clearly discriminated against engineers, whose experience made them at least as well fitted as brakemen for the position of conductor. The statute in the instant case, however, allows all who have been in the undertaking business for two years to take the examination. The length of the apprenticeship required, and the failure to provide any other method of qualification, such as study at a medical school, are objectionable in policy, as tending to create a self-perpetuating monopoly. See *Smith* v. *Texas, supra.* But, if the legislature may demand some practical experience of all applicants, it would seem that a two-year requirement is not so extravagant as to come under the constitutional inhibition. But *cf. State* v. *Walker* (1907) 48 Wash. 8, 92 Pac. 775.

CORPORATIONS—"DUMMIES"—OTHER CORPORATIONS AS INCORPORATORS.—Three corporations caused the organization of the plaintiff corporation by nominal incorporators, the stock being subscribed by the corporations directly or through trustees. Under the Ohio law the incorporators were not required to be shareholders. *Held,* the plaintiff was a corporation, at least *de facto. Kardo Co.* v. *Adams* (C. C. A., 6th Cir., Feb. 18, 1916). Not yet reported. See Notes, p. 331.

CORPORATIONS—STOCKHOLDERS—LIABILITY FOR EXECUTORY CONTRACTS OF CORPORATION.—The plaintiff made an executory contract with a corporation for the sale of furniture. Thereafter, but before delivery of the furniture, the defendant became a stockholder. The corporation having defaulted in its payments, the plaintiff seeks to hold the defendant under a statute making a stockholder individually liable for "debts and liabilities" of the corporation incurred during the time he was a stockholder. *Held,* the liability of the corporation was incurred, not upon the delivery of the goods but upon the making of the contract, at which time defendant was not a stockholder. *Coulter Dry Goods Co.* v. *Wentworth* (Cal. 1916) 153 Pac. 939.

The word "debts" as used in statutes imposing an individual liability upon stockholders, is generally construed as excluding claims against the corportion arising *ex delicto,* 15 Columbia Law Rev., 354, and also *ex contractu* prior to performance by the other party. *Wing* v. *Slater* (1896) 19 R. I. 597, 35 Atl. 302. But such words as "claims", "dues", or "liabilities" are given a broader construction, 4 Thompson, Corporations, § 4842, and include obligations not immediately en-

forcible by action. *Hunt* v. *Ward* (1893) 99 Cal. 612, 34 Pac. 335; *White* v. *Green* (1898) 105 Iowa 176, 74 N. W. 928. The obligation assumed by the corporation in the principal case upon the making of the contract was therefore a "liability" under the statute, *Herrick* v. *Wardwell* (1898) 58 Oh. St. 294, 50 N. E. 903; *Hyatt* v. *Anderson's Trustee* (1903) 25 Ky. L. Rep. 132, though a "debt" would not arise till the delivery of the goods. *Wing* v. *Slater, supra.* This construction furthers the remedial purpose of the statute in that one dealing with a corporation may rely upon the financial responsibility of the stockholders who are such when the contract is made, thus avoiding the insecurity which would result if the liability attached only upon his performance of the contract when the personnel of the stockholders might have changed completely. If the statute were penal, imposing the liability as a consequence of a failure to do some required act, it would have to be strictly construed, see *Manhattan Co.* v. *Kaldenburg* (1900) 165 N. Y. 1, 58 N E 790, at least as to the provisions specifying the act required to be performed; but even in such a statute the provisions defining the liability imposed, being remedial, may be liberally construed. *Morgan* v. *Hedstrom* (1900) 164 N. Y. 224, 58 N. E. 26.

CORPORATIONS—VALIDITY OF INCORPORATION—INQUIRY BY JUDGE ON HIS OWN MOTION.—In a suit to enjoin the infringement of a patent, the validity of the plaintiff's corporate existence was not raised by the pleadings, but the judge of his own motion dismissed the suit on account of the plaintiff's lack of corporate capacity. On appeal the Circuit Court of Appeals held this to be error, since the court had the right to investigate the plaintiff's existence *sua sponte* only when jurisdiction depended on the citizenship of the parties. *Kardo Co.* v. *Adams* (C. C. A., 6th Cir., Feb. 18, 1916) not yet reported.

The decision in the lower court was adversely commented upon in a note in 15 Columbia Law Rev. 706, which adopted the view set forth in the opinion of the Circuit Court of Appeals, and which was cited therein.

COSTS—TAXATION—STATUTORY AUTHORITY.—The plaintiff appeals from the taxation of the defendant's costs which included an allowance for the transcript of the testimony taken at the first trial. The statutes of Vermont do not include such an item among the taxable costs. *Held,* such costs were properly granted, since they were allowed by English statutes in force at the time when the common law of England was adopted as the law of Vermont. *Comstock's Admr.* v. *Jacobs* (Vt. 1915) 96 Atl. 4. See Notes, p. 336.

CRIMINAL LAW—ILLEGAL ARREST—EFFECT ON SUBSEQUENT CONVICTION.—An accused was arrested without a warrant in a case where such an arrest was not authorized under § 177 of the N. Y. Code Crim. Proc. *Held,* this did not make his conviction invalid, since jurisdiction was acquired by the magistrate when the accused was brought before him charged with the crime, regardless of the legality of the arrest. *People* v. *Park* (1915) 92 Misc. 369, 156 N. Y. Supp. 816.

In civil suits, the court will refuse to exercise its jurisdiction in favor of one who has obtained service of his summons by unlawful means, *Townsend* v. *Smith* (1879) 47 Wis. 623, 3 N. W. 439; *Matter of Lagrave* (N. Y. 1873) 45 How. Pr. 301, but the common law rule

for criminal offences is that want of authority for the prisoner's arrest cannot protect him from prosecution. *Ex parte Scott* (1829) 9 B. & C. 446; *Dows' Case* (1851) 18 Pa. 37; *cf. King* v. *Marks* (1802) 3 East 157. If illegally arrested the defendant is limited to his remedy by action against the individual for that wrong, and the illegal arrest does not prevent the court from acquiring jurisdiction to try the complaint. *Commonwealth* v. *Tay* (1898) 170 Mass. 192, 48 N. E. 1086. This rule seems to be in accord with the weight of authority in this country. *Blemer* v. *People* (1875) 76 Ill. 265; *In re Johnson* (1897) 167 U. S. 120, 17 Sup. Ct. Rep. 735. The cases in New York, however, are conflicting. Some of the lower courts have held that the magistrate acquires no jurisdiction of a person who has been illegally arrested, *People* v. *Howard* (1895) 13 Misc. 763, 35 N. Y. Supp. 233; *People* v. *James* (1896)) 11 App. Div. 609, 43 N. Y. Supp. 315, but the other view, which seems the more logical, is in accord with the principal case. The sole object of the information and warrant is to bring the defendant before the court for trial. See *People* v. *Cornell* (1894) 6 Misc. 568, 27 N. Y. Supp. 859. When that has been done, the court acquires jurisdiction of the person and may proceed to try the case on its merits, *People* v. *Eberspacher* (1894) 79 Hun 410, 29 N. Y. Supp. 796; *People* v. *Iverson* (1899) 46 App. Div. 301, 61 N. Y. Supp. 220, since it is the duty of the court to see that such a party be amenable to justice rather than to inquire into the circumstances under he was brought there. *Ex parte Scott, supra.*

DESCENT AND DISTRIBUTION—HEIRS—STATUTORY HEIRS.—The New York Consol. Laws Ch. 13; Laws of 1909, Ch. 18, § 91 provides that, when an intestate dies without heirs, an inheritance that came to the intestate from a deceased husband or wife shall descend to the heirs of such deceased husband or wife, who shall be deemed to be the heirs of such intestate. Persons designated as heirs by this statute contested the probate of a will. *Held,* it is beyond the power of the legislature to create an heir, and a statute purporting to do so merely operates as an assignment of the State's right of escheat, and does not entitle the assignee to contest the probate of a will. *Matter of Leslie* (Surrogate's Ct. N. Y. Co. 1915) 92 Misc. 663, 156 N. Y. Supp. 346. See Notes, p. 329.

EVIDENCE—ADMISSIONS—PLEA OF GUILTY IN PREVIOUS CRIMINAL SUIT.—The plaintiff was arrested and imprisoned on the charge of intoxication, and later, having pleaded guilty, was discharged on payment of a fine. He brought suit for false imprisonment and the defendant interposed the plea of guilty to the criminal suit as a defence. *Held,* this was merely an admission which was not conclusive. *Spain* v. *Oregon Washington Navigation Co.* (Ore. 1915) 153 Pac. 470.

In a civil action it is competent for the plaintiff to show that the defendant pleaded guilty to a criminal charge arising out of the same facts, the plea being treated as an admission which is not conclusive. *Markett* v. *Gemke* (1915) 154 N. Y. Supp. 780; *Crawford* v. *Bergen* (1894) 91 Iowa 675, 60 N. W. 205; see *Honaker* v. *Howe* (1869) 60 Va. 50; 2 Black, Judgments (2nd ed.) § 529; 1 Greenleaf, Evidence (16th ed.) § 527a. In an action for malicious prosecution the prior suit must have terminated favorably to the plaintiff, and therefore his plea of guilty, followed by a conviction, is a bar to the subsequent action, in the absence of fraud or deceit. *Lawrence* v. *Cleary* (1894)

88 Wis. 473, 60 N. W. 793; see *Erie R. R.* v. *Reigherd* (C. C. A. 1909) 166 Fed. 247. Where the plaintiff after a plea of guilty to the criminal suit for which he was arrested, brings an action for false imprisonment, the authorities are not in accord as to the result. Some courts hold that by pleading guilty to the charge the plaintiff has waived recovery for the unlawful arrest, *Erie R. R.* v. *Reigherd, supra,* or that the action is like malicious prosecution and the rule which applies to one must apply to the other. *Jones* v. *Foster* (1899) 43 App. Div. 33, 59 N. Y. Supp. 738. The opposite view would seem more just, as the party might well plead guilty to a technical charge to avoid expense, *Crawford* v. *Bergen, supra,* and the plaintiff could only be concluded by his plea if the action were between the same parties. *Schreiner* v. *The High Ct. of Ill. etc. Foresters* (1890) 35 Ill. App. 576; *cf. Farley* v. *Patterson* (1915) 166 App. Div. 358, 152 N. Y. Supp. 59.

EVIDENCE—OPINION—ADMISSIBILITY AS TO THE AMOUNT OF DAMAGES.—In condemnation proceedings opinion evidence not only as to the value of the land before and after taking but as to the amount of the landowner's damages was received. *Semble,* the admission of the latter evidence is error. *Montana Eastern Ry.* v. *Lebeck* (N. D. 1915) 155 N. W. 648.

When the measure of damages for injury to or taking of land is the difference between the reasonable market value of the land before and after the injury, in general, opinion evidence as to such value, but not as to the *quantum* of damages, is admissible. *City of Paducah* v. *Allen* (1901) 111 Ky. 361, 63 S. W. 981; *Bell County* v. *Flint* (Tex. Civ. App. 1905) 91 S. W. 329. Since it is a function of the jury to assess damages, to do so they should have facts before them on which to base their judgment; and, as it is not certain that a qualified witness will observe the legal method of measuring damages when giving his opinion, the rule excluding opinion evidence as to the amount of damages is preferable. *Taber* v. *N. Y. etc. R. R.* (1907) 28 R. I. 267, 67 Atl. 9; *Baltimore Belt R. R.* v. *Sattler* (1905) 100 Md. 306, 59 Atl. 654; *Central of Ga. Ry.* v. *Barnett* (1907) 151 Ala. 407, 44 So. 392. A contrary view has been held, however, by other courts, mainly on the theory that the desired result is thereby more speedily obtained, and on the assumption that the opinion as to damages is merely the result of subtraction. *Knapheide* v. *Jackson County* (1908) 215 Mo. 516, 114 S. W. 960; *Watson* v. *Colusa-Parrot etc. Co.* (1905) 31 Mont. 513, 79 Pac. 14; *Wade* v. *Carolina Tel. & Tel. Co.* (1908) 147 N. C. 219, 60 S. E. 987. The tendency is to uphold the admission of such evidence whenever possible, and when it is shown to be based on the value before and after taking, *Central Ga. Power Co.* v. *Mays* (1911) 137 Ga. 120, 72 S. E. 900, or where it is apparent that the jury were not influenced by it, *City of Huntsville* v. *Pulley* (1914) 187 Ala. 367, 65 So. 405; *Montgomery* v. *Somers* (1907) 50 Ore. 259, 90 Pac. 674, or where the evidence is harmless owing to proper instruction as to the measure of damages, its admission is not a reversible error. *Owen* v. *Chicago R. I. & P. Ry.* (1904) 109 Mo. App. 608, 83 S. W. 92.

GUARDIAN AND WARD—JURISDICTION TO APPOINT GUARDIAN—COLLATERAL ATTACK.—The plaintiffs, four minors, sue defendants in ejectment,

alleging that defendants claim title to certain land through a conveyance made by one Taubner, acting as plaintiffs' guardian, and that the probate court which appointed Taubner guardian had no jurisdiction to do so. *Held,* the jurisdiction of the court to appoint the guardian cannot be made the subject of a collateral attack in this action. *Hathaway* v. *Hoffman* (Okla. 1915) 153 Pac. 184.

A court of superior jurisdiction is presumed, upon collateral inquiry, to have acted within its authority, and the facts upon which the jurisdiction is based need not be set forth in the record. 1 Black, Judgments (2nd ed.) §§ 270, 274. Probate courts, in exercising their powers of appointing guardians for infants and for insane and incompetent persons, are generally considered to be courts of superior, though limited, jurisdiction; *Cox* v. *Boyce* (1899) 152 Mo. 576, 54 S. W. 467; *cf. Paslick* v. *Shay* (1912) 148 Ky. 642, 147 S. W. 369; and the weight of authority, which the principal case follows, supports the view that unless the lack of jurisdiction is apparent on the face of the record, *McGee* v. *Hayes* (1899) 127 Cal. 336, 59 Pac. 767; see *Williams* v. *Chicago etc. Ry.* (1913) 169 Mo. App. 468, 155 S. W. 64, a collateral attack on the jurisdiction to make the appointment cannot be successful, although the attack might have succeeded if made on an appeal or other direct proceeding. *Cox* v. *Boyce, supra*; *Sturtevant* v. *Robinson* (1909) 133 Ga. 564, 66 S. E. 890; *Fecht* v. *Freeman* (1911) 251 Ill. 84, 95 N. E. 1043; see *Dequindre* v. *Williams* (1869) 31 Ind. 444. A few courts, however, have expressed the view that the jurisdiction of the court, although unimpeachable by the record, may be attacked by evidence given in a collateral proceeding. See *Paslick* v. *Shay, supra*; *Modern Woodmen of America* v. *Hester* (1903) 66 Kan. 129, 71 Pac. 279; *cf. People's Savings Bank* v. *Wilcox* (1886) 15 R. I. 258, 3 Atl. 211.

GUARDIAN AND WARD—UNAUTHORIZED PURCHASE OF REALTY—RATIFICATION BY COURT.—An infant's guardian, without previous authorization by the court, purchased real estate with his ward's funds. *Held,* while the court has the power to ratify such an unauthorized purchase of realty, a subsequent court order authorizing a sale of the realty so acquired was not a ratification, as the question was not directly before it. *Empire State Surety Co.* v. *Cohen* (1916) 156 N. Y. Supp. 935.

It is held in most jurisdictions that, where it is for the benefit of the minor, a court of chancery possesses inherent powers to order the conversion of the property of an infant from personalty to realty or *vice versa, Roberts* v. *Roberts* (1913) 259 Ill. 115, 102 N. E. 239; *Inwood* v. *Twyne* (1762) Amb. 417, 2 Eden 148, although the descendible character of the property may not be altered by the conversion, the estate retaining its previous character until the infant becomes of age. *Singleton* v. *Love* (1858) 38 Tenn. 357; *Matter of Bolton* (N. Y. 1897) 20 Misc. 532, 46 N. Y. Supp. 908. The existence of this jurisdiction, in the absence of statutory authorization, has, however, often been denied. Woerner, American Law of Guardianship, § 68. But the guardian of a minor, unless he obtains a previous order from a court of competent jurisdiction, is not authorized to purchase land with the personal property of the infant, *Boisseau* v. *Boisseau* (1884) 79 Va. 73; *Chapman* v. *American Surety Co.* (1914) 261 Ill. 594, 104 N. E. 247; see *Sherry* v. *Sansberry* (1852) 3 Ind.

320; Woerner, American Law of Guardianship, § 54, and if he does so without authority, his ward, upon attaining his majority, has the option of ratifying the purchase and accepting the realty, or of repudiating the transaction and recovering the amount invested from the guardian, who is then entitled to the land. *Eckford* v. *DeKay* (N. Y. 1840) 8 Paige *89; *Wood's Estate* (1915) 247 Pa. 478, 93 Atl. 634. While some cases have held that the court itself will refuse to ratify the unauthorized purchase of real estate by the guardian, *Succession of Mitchell* (1881) 33 La. Ann. 353; *cf. In re Miller's Estate* (1845) 1 Pa. 326; 2 Perry, Trusts and Trustees (6th ed.) § 606, the majority view, which is accepted in the principal case, is that if the court would have authorized the purchase had previous application been made to it, it should ratify the transaction upon a subsequent application. *Chapman* v. *American Surety Co., supra*; see *Inwood* v. *Twyne, supra*; *Eckford* v. *DeKay, supra*; *Hendee* v. *Cleveland* (1881) 54 Vt. 142.

INJUNCTIONS—RIGHT OF LESSEE TO ENJOIN INJURY CAUSING TRIVIAL DAMAGE TO PROPERTY.—A lessee in possession sought a mandatory injunction ordering the defendant to tear down that part of his building which obstructed an alley on the premises occupied, causing unsubstantial damage to the lessee's use of the property. *Semble,* the lessee had no such interest as would entitle him to enjoin the obstruction. *Gimbel Bros.* v. *Milwaukee Boston Store* (Wis. 1915) 154 N. W. 998.

A tenant for years is entitled to the possession of the demised property for the term of his lease, and may recover damages for any injury to his possession; *Bass* v. *West* (1900) 110 Ga. 698, 36 S. E. 244; as, for instance, an obstruction of a private right of way, *Morrison* v. *Chicago & N. W. Ry.* (1902) 117 Iowa 587, 91 N. W. 793, or of his right of ingress and egress, *Coleman* v. *Holden* (1906) 88 Miss. 798, 41 So. 370, or for the violation of any other easement incident to the leasehold, *Brown* v. *Honeyfield* (1908) 139 Iowa 414, 116 N. W. 731; *Avery* v. *N. Y. Cent. & H. R. R. R.* (Super. Ct. of Buffalo, 1889) 7 N. Y. Supp. 341, or for a nuisance causing the lessee special damage, *Bentley* v. *City of Atlanta* (1893) 92 Ga. 623, 18 S. E. 1013, or under a statute awarding damages to abutting owners, where the evidence shows an injury to his leasehold interest. *Galeano* v. *Boston* (1907) 195 Mass. 64, 80 N. E. 579; *City of Detroit* v. *Little* (1905) 141 Mich. 637, 104 N. W. 1108. Furthermore, equity will grant the lessee an injunction restraining any such violation of his rights. *Miller* v. *FitzGerald Co.* (1901) 62 Neb. 270, 86 N. W. 1078; *Johnson* v. *Robertson* (1912) 156 Iowa 64, 135 N. W. 585; *Beir* v. *Cooke* (1885) 37 Hun 38. The lessor, on the other hand, is denied a recovery for any injury except to his reversionary interest. *Tobias* v. *Cohn* (1867) 36 N. Y. 363; *Kansas City F. S. & M. R. R.* v. *King* (1896) 63 Ark. 251, 38 S. W. 13. It is a corollary to this proposition that a lessee may not enjoin, or recover damages for any injury which affects only the reversionary interest of the lessor. In the principal case, however, the injury inflicted, while trivial and unsubstantial, was to the possession of the lessee, and the court's refusal to interfere is more easily supported upon the theory of balancing the injuries, see 6 Pomeroy, Eq. Jur., § 552, than on the ground that the petitioner has no interest entitling him to relief.

JUDGMENTS—EVENLY DIVIDED COURT—AFFIRMANCE—PRECEDENT.—On appeal from a trial court the appellate court was evenly divided, and the judgment of the trial term overruling a demurrer was thereby sustained. On a second appeal, *held,* such a decision by a divided court does not form a precedent for other like cases, but will be the law of the same case on subsequent appeal. *Gourlay* v. *Ins. Co. of North* America (Mich. 1915) 155 N. W. 483.

Formerly, it was the rule at common law that when an appellate court was evenly divided, no judgment could be entered. *Proctor's case* (1614) 12 Co. 118; *Deane* v. *Clayton* (1817) 7 Taunt. 489, 536; see *Durant* v. *Essex Co.* (1864) 90 Mass. 103, 107. Now, however, it is uniformly held that in such a situation, since the appellant has failed to sustain the burden resting on him, the judgment of the lower court stands, and the practice is to enter a judgment of affirmance. *Durant* v. *Essex Co.* (1868) 74 U. S. 107; *Charlottesville & A. Ry.* v. *Rubin* (1908) 107 Va. 751, 60 S. E. 101; *Hertz* v. *Woodman* (1910) 218 U. S. 205, 30 Sup. Ct. Rep. 621; but *cf. Elizabeth-Town* v. *Springfield* (1809) 3 N. J. L. 475, 479. The doctrine is also based on the expediency of ending the litigation. See *Luco* v. *DeToro* (1891) 88 Cal. 26, 25 Pac. 983. In England, an affirmance by a divided court is not only binding on the parties, but serves as a precedent under the rule of *stare decisis. Beamish* v. *Beamish* (1861) 9 H. L. *274, *284, *338, *344, *349. While in this country such an affirmance controls a subsequent appeal of the same case, *Lathrop* v. *Knapp* (1875) 37 Wis. 307; *Chahoon* v. *Commonwealth* (1871) 62 Va. 822, it is generally held that it will not be a precedent for other cases. *Morse* v. *Goold* (1854) 11 N. Y. 281, 285; *City of Kalamazoo* v. *Crawford* (1908) 154 Mich. 58, 117 N. W. 572; *Westhus* v. *Union Trust Co.* (1909) 168 Fed. 617. This would seem to be the sounder view, inasmuch as the affirmance is made only because of the necessity of the situation, and the court by such act expressly declares its inability to decide the question of law.

JURISDICTION—LOCAL ACTIONS—FOREIGN REAL ESTATE.—Under § 982a of the Code of Civil Procedure authorizing suit in New York for damages to real property in another State, the plaintiff sought to recover for injuries inflicted before the passage of that Act. *Held,* the statute is not retroactive and the plaintiff cannot recover. *Jacobus* v. *Colgate* (N. Y. Ct. of Appeals 1916) 54 N. Y. L. J. 2033. See Notes, p. 323.

MORTGAGES—DEFICIENCY ON FORECLOSURE—LIABILITY FOR.—The plaintiff in an action to foreclose a mortgage sought a deficiency judgment against the defendant who had assumed and agreed to pay the mortgage debt. It appeared that a predecessor of the defendant, deriving title from the mortgagor, was not personally liable for the debt. *Held,* nevertheless the defendant was liable for the deficiency. *McDonald* v. *Finseth* (N. D. 1916) 155 N. W. 863.

By the great weight of authority in the United States, a beneficiary of a contract is held to be able to sue the promisor directly on the promise made for his benefit, Pomeroy, Code Remedies § 77, and many courts have held logically that the grantee of the equity of redemption who assumes and agrees to pay the mortgage debt is liable by virtue of the contract to the mortgagee for any deficiency arising after the sale of the mortgaged premises, while other courts have placed the right of the mortgagee on the equitable doctrine of subrogation and

allowed him to sue the grantee directly to avoid circuity of action. 10 Columbia Law Rev. 765. But when the grantor of the person sought to be charged for a deficiency is not personally liable for the mortgage debt, those courts adopting the equitable theory of liability have uniformly refused to permit a recovery, *Osborne* v. *Cabell* (1883) 77 Va. 462; *Fry* v. *Ausman* (1912) 29 S. D. 30, 135 N. W. 708; *Norwood* v. *De Hart* (1879) 30 N. J. Eq. 412, following the doctrine laid down in the leading case of *King* v. *Whitely* (N. Y. 1843) 10 Paige 465. A number of jurisdictions have carried the beneficiary theory to its full extent and allowed a recovery whether the grantor of the defendant was personally liable or not. *Crone* v. *Stinde* (1900) 156 Mo. 262, 55 S. W. 863, 56 S. W. 907, overruling *Hicks* v. *Hamilton* (1898) 144 Mo. 495, 46 S. W. 432; *Hare* v. *Murphy* (1895) 45 Neb. 809, 64 N. W. 211; *McKay* v. *Ward* (1899) 20 Utah 149, 57 Pac. 1024; *Bay* v. *Williams* (1884) 112 Ill. 91, 1 N. E. 340. It has been suggested that there is no consideration for the promise in such a case, see dissenting opinion in *McKay* v. *Ward, supra*; *Brewer* v. *Maurer* (1883) 38 Ohio St. 543, but the grant to the promisor is ample consideration, although it is certainly open to the objection that it does not move from the promisee. The limitations put upon the beneficiaries' right of recovery in *Vrooman* v. *Turner* (1877) 69 N. Y. 280, have been extensively followed in this class of cases, and it may safely be said that the principal case represents a minority of courts in giving undeserved relief in a case where a theory that the courts as a general rule are anxious to limit, must be applied. *Morris* v. *Mix* (1896) 4 Kan. App. 654, 46 Pac. 58; *Ward* v. *DeOca* (1898) 120 Cal. 102, 52 Pac. 130; *Y. M. C. A.* v. *Croft* (1898) 34 Ore. 106, 55 Pac. 439; see *Wood* v. *Johnson* (1912) 117 Minn. 267, 135 N. W. 746; see 15 Harvard Law Rev. 790.

MUNICIPAL CORPORATIONS—ORDINANCES—CONFLICT WITH STATE LAW.—The defendant contested the validity of an ordinance that fixed a higher standard of food value for milk sold within the city than the general state law required, and fixed a more severe penalty for violations. *Held*, the ordinance was not in conflict with the State law, and was valid. *Kansas City* v. *Henre* (Kan. 1915) 153 Pac. 548.

The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional reasonable requirements, *Ex parte Yong Shin* (1893) 98 Cal. 681, 33 Pac. 799, unless there is a conflict between the two. *Wood* v. *City of Brooklyn* (N. Y. 1852) 14 Barb. 425. Many acts are dangerous in the city, though not in the country, and it may be presumed that the legislature intends these to be locally regulated. See *Christensen* v. *Tate* (1910) 87 Neb. 848, 128 N. W. 622. Thus, additional municipal restrictions on the speed of automobiles, *Christensen* v. *Tate, supra*, or on the running of trains, *Gulf, etc. R. R.* v. *Calvert* (1895) 11 Tex. Civ. App. 132, 32 S. W. 246; *contra, Horn* v. *Railway* (1875) 38 Wis. 463, are valid. Moreover, some offenses are more injurious when committed in a densely populated community than in the state at large, and hence the municipality may provide a penalty in addition to that prescribed by the state statute. *Town of Neola* v. *Reichart* (1906) 131 Iowa 492, 109 N. W. 5. The ordinance in the principal case might perhaps be sustained so far as the increased penalty is concerned; see *Polinsky* v. *People* (1878) 73 N. Y. 65, 71;

but there would appear to be no good reason for requiring a higher standard of food value in milk in the city than in the country, and although the principal case finds some support, *Ex parte Hoffman* (1909) 155 Cal. 114, 99 Pac. 517, apparently overruling *In re Desanta* (1908) 8 Cal. App. 295, 96 Pac. 1027, such an ordinance would seem to be void as in conflict with the statutory regulations. *City of St. Louis* v. *Klausmeier* (1908) 213 Mo. 119, 112 S. W. 516.

NEGOTIABLE INSTRUMENTS—THEFT AND NEGOTIATION OF INCOMPLETE INSTRUMENT.—The defendant when sued on a promissory note, set up as a defence that the note was signed in blank and stolen before completion. The Negotiable Instruments Law, § 15, (N. Y. § 34), provides that an incomplete instrument which has not been delivered would not, if filled in and negotiated, be a valid contract in the hands of any holder. It is provided in § 16, (N. Y. § 35), that every contract on a negotiable instrument is incomplete until delivery, but in the hands of a holder in due course a valid delivery will be presumed. *Held,* § 16, (N. Y. § 35), only applies to completed instruments, and the defendant, under § 15, (N. Y. § 34), is absolved from liability. *Holzman, Cohen & Co.* v. *Teague* (Sup. Ct. 1915) 156 N. Y. Supp. 290.

At common law delivery was necessary to the validity of negotiable paper, and consequently if a bill or note, complete except for delivery, was stolen or passed on to a holder in due course, the maker had a perfect defence. *Burson* v. *Huntington* (1870) 21 Mich. 415; *Palmer* v. *Poor* (1889) 121 Ind. 135, 22 N. E. 984; *Salley* v. *Terrill* (1901) 95 Me. 553, 50 Atl. 896; *contra, Kinyon* v. *Wohlford* (1871) 17 Minn. 239; *cf. Worsham* v. *State* (1909) 56 Tex. Crim. App. 253, 120 S. W. 439. The purpose of the Negotiable Instruments Law, § 16, (N. Y. § 35), was to prevent non-delivery by the maker from being used as a defence to a suit on a note complete in form and execution by a holder in due course. 8 Michigan Law Rev., 40. Accordingly, if an instrument completed, but not delivered, is stolen and reaches the hands of a holder in due course, there is no defence. *Buzzell* v. *Tobin* (1909) 201 Mass. 1, 86 N. E. 923; *Schaeffer* v. *Marsh* (1915) 90 Misc. 307, 153 N. Y. Supp. 96. Where, however, an incomplete instrument is stolen before delivery the common law rule that there could be no recovery even by a holder in due course, *Baxendale* v. *Bennett* (1878) 3 Q. B. D. 525; Daniels, Negotiable Instruments (6th ed.) § 841 (2), has been followed under the Negotiable Instruments Law, § 15, (N. Y. § 34). *Linick* v. *Nutting & Co.* (1910) 140 App. Div. 265, 125 N. Y. Supp. 93; see *Mass. Nat. Bank* v. *Snow* (1905) 187 Mass. 159, 72 N. E. 959. It has been urged that in such a case the doctrine of estoppel would apply, Ewart, Estoppel, 458 *et seq.,* but the suggestion finds support only in the case where the bank of deposit cashes a check signed in blank by the maker and which is stolen while incomplete, and filled in. Since the bank must at peril pay to the depositor's order, the maker has breached a duty owing to it in signing the check in blank. *Trust Co. of America* v. *Conklin* (1909) 65 Misc. 1, 119 N. Y. Supp. 367.

PARTNERSHIP—NEGOTIABLE INSTRUMENTS—FIRM AND INDIVIDUAL OBLIGATIONS.—The members of a partnership united in signing, with their individual names, several promissory notes, the consideration for which was paid on the credit of the partnership and used for its benefit. The

trustee in bankruptcy contended that the notes were the individual obligations of the partners. *Held,* the notes should be proved and allowed as partnership obligations. *In re C. H. Kendrick & Co.*. (D. C., D. Vt., 1915) 226 Fed. 978.

The partnership name under which a firm engages in business is in point of law merely a conventional title applicable to the persons who are members of the partnership, the law for this purpose ignoring the idea of the firm as an entity distinct from its members. Lindley, Partnership (7th ed.) 129; Burdick, Partnership (2nd ed.) 88, 89. Hence it is uniformly held that an obligation, signed individually by all the members of a firm, and given in a partnership transaction for a consideration which was paid on the credit of the partnership, is a partnership obligation. *Berkshire Woolen Co.* v. *Juillard* (1879) 75 N. Y. 535; *Carson, etc. Co.* v. *Byers & Eggers* (1885) 67 Iowa 606, 25 N. W. 826; *Davis* v. *Turner* (C. C. A. 1903) 120 Fed. 605. But the individual makers are held liable where the consideration, though used by the firm, was given on their individual credit, *In re Robson* (C. C. A. 1914) 218 Fed. 452, or where they received the consideration as individuals, although it was afterward transferred to the partnership. *In re Weisenberg & Co.* (D. C. 1904) 131 Fed. 517. Proof that a note signed by the individual members is a partnership obligation does not violate the parol evidence rule, *Dreyfus* v. *Union Nat. Bank* (1896) 164 Ill. 83, 45 N. E. 408, nor the rule that only parties to a negotiable instrument may be sued thereon. See *In re Weisenberg & Co., supra.* Where, however, a part only of the members of the partnership sign the note, and there is no evidence that the signature was adopted as the partnership name for the transaction, *Carter* v. *Mitchell* (1893) 94 Ky. 261, 22 S. W. 83, both rules would seem to apply, and the note cannot be treated as a firm obligation; Lindley, Partnership (7th ed.) 209; *Farmers' Bank* v. *Bayless* (1865) 35 Mo. 428; *contra, Jacks* v. *Greenhaw* (1912) 105 Ark. 615, 152 S. W. 160; but if the debt was in fact incurred for the partnership, the note will be regarded as collateral, and a suit may be maintained against the partnership to recover the consideration. *Mills* v. *Riggle* (1911) 83 Kan. 703, 112 Pac. 617; *Beckwith* v. *Mace* (1905) 140 Mich. 157, 103 N. W. 559.

PARTNERSHIP — DISSOLUTION — RIGHT OF RETIRING PARTNER TO HAVE PARTNERSHIP ASSETS APPLIED TO PAYMENT OF PARTNERSHIP DEBTS.—One partner sold his interest to his copartner while the firm was solvent, the latter agreeing to pay the partnership debts. On the bankruptcy of a corporation to which the purchasing partner had transferred all the assets, the retiring partner applied to the court to compel the application of certain partnership property which came into the hands of the trustee to the payment of partnership debts. *Held,* the application should be denied. *Rapple* v. *Dutton* (C. C. A., 9th Cir., 1915) 226 Fed. 430.

Each member of a partnership has an equitable right to have the partnership property applied to discharge the debts of the firm. Lindley, Partnership (7th ed.) 387 *et seq.*; see *Fitzpatrick* v. *Flannagan* (1882) 106 U. S. 648, 1 Sup. Ct. Rep. 369; *Hargadine-McKittrick etc. Co.* v. *Belt* (1897) 74 Ill. App. 581. But if one partner in good faith sells his interest to the other, the firm title is divested, and the purchaser takes the property free from any right to have it applied to

the firm debts which the retiring partner, or the partnership creditors through him, may assert, *Ex parte Ruffin* (1801) 6 Vesey 119; *Stanton* v. *Westover* (1886) 101 N. Y. 265, 4 N. E. 529; see *Giddings* v. *Palmer* (1871) 107 Mass. 269; *Thayer* v. *Humphrey* (1895) 91 Wis. 276, 64 N. W. 1007; *contra, Tenney* v. *Johnson* (1861) 43 N. H. 144; *Conroy* v. *Woods* (1859) 13 Cal. 626; *cf. In re Filmar* (C. C. A. 1910) 177 Fed. 170, unless the equitable right is expressly reserved or specific assets are designated to pay the partnership debts. *Fries* v. *Ennis* (1890) 132 Pa. 195, 19 Atl. 59; *Shackelford's Admr.* v. *Shackelford* (1879) 73 Va. 481, 502-505; see *Reddington* v. *Franey* (1905) 124 Wis. 590, 102 N. W. 1065; Bates, Partnership, § 552. But where the transfer is made under such circumstances as to amount in law to a fraud upon the creditors, it is void, because a fraudulent conveyance, and the creditors' rights will not be barred. Burdick, Partnership (2nd ed.) 115 *et seq.*; *In re Terens* (D. C. 1910) 175 Fed. 495; see *Bulger* v. *Rosa* (1890) 119 N. Y. 459, 24 N. E. 853. Since the facts of the principal case show no fraud in law, nor any specific fund set aside for the payment of partnership debts, but merely a personal obligation against the purchasing partner, the application of the retiring partner was properly denied.

PLEADING AND PRACTICE—ABATEMENT OF ACTION—PENDENCY OF ANOTHER ACTION.—To the defendant's plea in abatement because of the pendency of another action involving the same questions and between the same parties, the plaintiff replied that since the institution of the present suit the previous one had been dismissed. The defendant demurred. *Held,* the demurrer should be overruled. *Grenada Bank* v. *Bourke* (Miss. 1916) 70 So. 449.

The common law "abhors a multiplicity of suits"; and if there was a writ in existence when a second writ was sued out, the second action was considered to be plainly vexatious and bad *ab initio.* 1 Bac. Abr., Title Abatement, M. This rule was applied in all its strictness under the early practice in the states, so that if the first suit was pending when the second was commenced, the second would be abated even though the first was thereafter dismissed. Gould, Pleading (6th ed.) 459, 460; *Parker* v. *Colcord* (1819) 2 N. H. 36; *LeClerc* v. *Wood* (Wis. 1847) 2 Pinney 37; *Beach* v. *Norton* (1830) 8 Conn. 71; see *Commonwealth* v. *Churchill* (1809) 5 Mass. 174. But the tendency of the modern cases is towards a more liberal construction; and it is now settled that if the first action is disposed of before the plea in abatement is filed, the plea must be overruled. *Coaldale Brick & Tile Co.* v. *Southern Const. Co.* (1895) 110 Ala. 605, 19 So. 45; *Leavitt* v. *Mowe* (1880) 54 Md. 613; *Kesterson* v. *Southern Ry.* (1907) 146 N. C. 276, 59 S. E. 871. Many courts allow the plaintiff to avoid the plea by dismissing the prior action after the plea in abatement has been filed but before a hearing thereon. *Manufacturer's Bottle Co.* v. *Taylor-Stites Glass Co.* (1911) 208 Mass. 593, 95 N. E. 103; *Brown* v. *Brown* (1913) 110 Me. 280, 86 Atl. 32; see *Averill* v. *Patterson* (1853) 10 N. Y. 500; *Winner* v. *Keuhn* (1897) 97 Wis. 394, 72 N. W. 227; *State* v. *Hines* (Mo. 1910) 128 S. W. 250. And one court has adopted the extreme view that the dismissal of the prior action at any time before the completion of the trial of the second action will defeat the plea in abatement. *Moore* v. *Hopkins* (1890) 83 Cal. 270, 23 Pac. 318. The rule which allows the plaintiff to avoid the effect of the plea in

abatement by dismissing the first action at any time before the hearing on the plea, is sound on principle, and in adopting it, the principal case is correct.

PLEADING AND PRACTICE—SUPPLEMENTAL PLEADING—QUO WARRANTO—ORIGINAL COMPLAINT DEFECTIVE.—In an action in the nature of *quo warranto* to try the title to an office, the plaintiff filed his original complaint before the defendant had been admitted to the office. After the defendant was sworn in, the plaintiff filed a supplemental petition, stating that fact. *Held,* one judge dissenting, that since no cause of action was stated in the original complaint, the plaintiff could not remedy the defect by a supplemental petition. *Reader* v. *Farriss* (Okla. 1915) 153 Pac. 678.

In a proper case, supplemental pleadings are allowed almost as a matter of course, see *Milliken* v. *McGarrah* (N. Y. 1914) 164 App. Div. 110, 149 N. Y. Supp. 484, though the court can always use its discretion. *McEvoy* v. *Court of Honor* (1913) 184 Ill. App. 317; *Union Marine Ins. Co.* v. *Charlie's Transfer Co.* (1914) 186 Ala. 443, 449, 65 So. 78. Matters which have arisen or have been discovered subsequent to the filing of the original complaint, and which are necessary in order to obtain complete relief in the one suit, should be brought in by a supplemental pleading, *Niagara Oil Co.* v. *Jackson* (1910) 48 Ind. App. 238, 91 N. E. 825; *Melvin* v. *E. B. & A. L. Stone Co.* (1908) 7 Cal. App. 324, 94 Pac. 389, or they cannot be considered or embraced in a decree. *Sayre* v. *Sage* (1910) 47 Colo. 559, 108 Pac. 160. A new and distinct cause of action, or facts antagonistic to the original case, cannot properly be included in a supplemental pleading, *Nat. Bank of Anadarko* v. *1st Nat. Bank of Anadarko* (1913) 39 Okla. 225, 134 Pac. 866; *John D. Park & Sons Co.* v. *Hubbard* (1910) 198 N. Y., 136, 91 N. E. 261; *Maynard* v. *Green* (1887) 30 Fed. 643, and when the original complaint fails to state a cause of action, the defect cannot be cured by a supplemental complaint alleging the omitted essentials. *Keeler* v. *Parks* (1913) 72 Wash. 255, 130 Pac. 111; *Meyer* v. *Berlandi* (1888) 39 Minn. 438, 40 N. W. 513; *Morse* v. *Steele* (1901) 132 Cal. 456, 64 Pac. 690; *cf. Smith* v. *Smith* (1879) 22 Kan. 699; but *cf. Brewster* v. *The Brewster Co.* (N. Y. 1910) 138 App. Div. 139, 122 N. Y. Supp. 1019. Since an action in the nature of *quo warranto* will not lie against one who has never been admitted to the office, *The King* v. *Whitwell* (1792) 5 D. & E. *85, the plaintiff in the principal case failed to make out a cause of action by his first complaint, and the court correctly ruled that it was error to allow this defect to be cured by a supplemental petition.

PLEADING AND PRACTICE—WRITS OF PROHIBITION—JUDICIAL AND MINISTERIAL ACTS.—A statute defined the writ of prohibition as the counterpart of the mandamus, and provided that it should issue to restrain any officer from exceeding his jurisdiction. The plaintiff applied for a writ to restrain the state treasurer from placing the interest from certain school funds in the general funds of the state. *Held,* the statute does not contemplate making prohibition the exact counterpart of mandamus, since the word "jurisdiction" which follows can only refer to a judicial or quasi-judicial function; the writ was denied, on the ground that the act sought to be prohibited was merely ministerial. *State* v. *Ewert* (S. D. 1916) 156 N. W. 90. See Notes, p. 338.

REPLEVIN—SET-OFF AND RECOUPMENT—JUDGMENT ON COUNTERCLAIM.—The plaintiff, owner of a herd of cattle which had trespassed on the defendant's land, replevied five head which the defendant had impounded. *Held,* at the trial of this action the defendant was entitled to judgment on counterclaim for the damage done by the entire herd. *Holmberg v. Will* (Okla. 1915) 153 Pac. 832.

It was well settled in the earlier cases that set-offs, which were of statutory origin, could not be pleaded in tort actions; they had no place, therefore, in the action of replevin, which sounded in tort. See 10 Columbia Law Rev., 368. A few apparent exceptions may be noted, in which the claims were merely defensive and were rather of the nature of recoupment, a doctrine introduced by common law courts. 1 Pomeroy, Eq. Jur. (3rd. ed.) §§ 113, 175; *Macky* v. *Dillinger* (1873) 73 Pa. St. 85; *Bloodworth* v. *Stevens* (1875) 51 Miss. 475; *Fairman* v. *Fluck* (Pa. 1836) 5 Watts 516; *contra, Dearing etc. Co.* v. *Thompson* (1909) 156 Mich. 365, 120 N. W. 801. The filing of a counterclaim in replevin is sometimes expressly or impliedly forbidden by statute. *Sylvester* v. *Ammons* (1904) 126 Iowa 140, 101 N. W. 782; *cf. Kennett* v. *Fickel* (1889) 41 Kan. 211, 21 Pac. 93. In most states, the statutes authorize the defendant to counterclaim for damages arising out of the transaction set forth in the complaint or concerning the subject of the action. As used in these statutes, counterclaim embraces both set-off and recoupment, see *McHard* v. *Williams* (1896) 8 S. D. 381, 66 N. W. 930, and is generally allowed in replevin. In some jurisdictions this would appear to be limited to claims strictly defensive, see *McCormick Harvesting Co.* v. *Hill* (1904) 104 Mo. App. 544, 79 S. W. 745, or to what might have been pleaded in recoupment at common law. *Hudson* v. *Snipes* (1882) 40 Ark. 75. The modern tendency, however, is in accord with the more liberal view adopted in the principal case, and allows a counterclaim for affirmative relief in excess of the plaintiff's demand. *McCormick Harvesting Co.* v. *Hill, supra*; *Minneapolis etc. Co.* v. *Darnall* (1900) 13 S. D. 279, 83 N. W. 266; *Wilson* v. *Hughes* (1886) 94 N. C. 182; but see *Glide* v. *Kayser* (1909) 142 Cal. 419, 76 Pac. 50.

SPECIFIC PERFORMANCE—DAMAGES—JURISDICTION.—A married woman contracted to convey a greater estate than she owned. A statute made it possible for a married woman to contract, but prevented her from conveying without the written consent of her husband. The plaintiff had constructive notice of the nature of the estate, and the fact that the defendant was a married woman. *Semble,* under the combined procedure plaintiff may have damages, though formerly, to get damages in equity, he must have been ignorant of the fact that specific performance is impossible, when he filed his bill. *Warren* v. *Dail* (N. C. 1915) 87 S. E. 126. See Notes, p. 326.

SURETYSHIP—SURETY'S DEFENCE—RIGHT TO CONTROL APPLICATION OF PAYMENTS.—Plaintiff furnished materials to a contractor, part of which were used for a municipal improvement. The contractor, by assigning the payments to be made by the city, received advances from a bank which he paid to plaintiff, amounting to more than the value of the materials used in the improvement. Plaintiff receiving no direction for application or notice of the source of these payments, applied them

to debts for materials not used in the improvement. Defendants were sureties on the contractor's bond securing the payment for materials used in the improvement. *Held,* one judge dissenting, that the money received by the plaintiff must be applied in payment for materials used in the improvement, thereby releasing the sureties. *Columbia Digger Co.* v. *Sparks* (C. C. A. 9th Cir. 1915) 227 Fed. 780.

A principal has a legal right, to the exercise of which a surety cannot object, to direct the application of payments to any one of two or more debts owed a creditor, *Stone* v. *Seymour* (N. Y. 1835) 15 Wend. 19; see *United States* v. *Kirkpatrick* (1824) 22 U. S. 720, unless, with the knowledge of the creditor, the debtor seeks to divert the application of specific money or property which he is bound under his contract with the creditor to remit or deliver. See *Boyd* v. *Agricultural Ins. Co.* (1904) 20 Colo. App. 28, 76 Pac. 986. In case the principal omits to designate to which debt the payment shall be applied, the creditor has a legal right to do so, and his application will govern, *Puget Sound State Bank* v. *Gallucci* (1904) 82 Wash. 445, 144 Pac. 698; *Bankers' Surety Co. of Cleveland* v. *Maxwell* (C. C. A. 1915) 222 Fed. 797, and it makes no difference that the surety for one of the debts was not aware of other indebtedness of his principal. *Arbuckles & Co. Ltd.* v. *Chadwick* (1892) 146 Pa. 393, 23 Atl. 346. In Washington it has been held that where the creditor receives money with notice that it is the proceeds of the contract for which the surety is liable, that notice equitably binds him to apply it to the relief of the surety. *Crane & Co.* v. *Pacific Heat etc. Co.* (1904) 36 Wash. 95, 78 Pac. 460; see *Hughes & Co.* v. *Flint* (1911) 61 Wash. 460, 112 Pac. 633. Since the creditor in the principal case had no notice of the source of the payments, upon the existence of which fact the Washington doctrine depends, it would seem that the dissenting judge was correct in saying that the sureties should not be discharged. *Cf. Bankers' Surety Co. of Cleveland* v. *Maxwell, supra.*

WILLS—ATTORNEY AND CLIENT—COSTS AND COUNSEL FEES.—The plaintiff contested the probate of his wife's will and it was set aside for want of testamentary capacity. *Held,* the plaintiff's statutory costs and reasonable attorney's fees should be charged against the estate. *In re Merica's Estate* (Neb. 1915) 155 N. W. 887.

In proceedings for the probate or contest of wills, it is often provided by statute that the court may exercise its discretion in awarding costs. *In re Donges's Estate* (1899) 103 Wis. 497, 513, 79 N. W. 786; *Brown* v. *Corey* (1883) 134 Mass. 249. Under such statutes it is quite generally held that counsel fees are not included in costs, *Estate of Olmstead* (1898) 120 Cal. 447, 52 Pac. 804; *Brilliant* v. *Wayne Circuit Judges* (1896) 110 Mich. 68, 67 N. W. 1101; *Matter of Jackman* (1870) 26 Wis. 143; *Brown* v. *Corey, supra,* although they are allowed when the statute provides for "costs and expenses". *In re Statler's Estate* (1910) 58 Wash. 199, 108 Pac. 433; *Bioren* v. *Nesler* (1909) 76 N. J. Eq. 576, 74 Atl. 791. Whether counsel fees should be charged against the estate will depend upon the purpose of the suit, the party claiming them, and the local statute. The courts usually charge the estate for the legal expenses of a nominated executor in establishing or maintaining a will, see 10 Columbia Law Rev., 460, or of one who in good faith brings suit simply to have a will construed. *Moore* v. *Alden* (1888) 80 Me. 301, 14 Atl. 199; *cf.*

Thornton v. *Zea* (1900) 22 Tex. Civ. App. 509, 55 S. W. 798. Where a party enters the contest of a will as an individual, counsel fees are not generally chargeable against the estate, whether he be successful, *Koenig* v. *Ward* (1906) 104 Md. 564, 65 Atl. 345; *McCormick* v. *Elsea* (1907) 107 Va. 472, 59 S. E. 411; *In re Smith's Estate* (1914) 165 Iowa 614, 146 N. W. 836, or unsuccessful. *Wallace* v. *Sheldon* (1898) 56 Neb. 55, 76 N. W. 418; *In re Donges's Estate, supra.* But that circumstances might make such an order just, as pointed out in the principal case, has been recognized by an express statute. *In re Mullenschalader's Estate* (1902) 137 Wis. 32, 118 N. W. 209. And under a statute sufficiently broad even unsuccessful contestants have been allowed counsel fees out of the estate. *Bioren* v. *Nesler, supra.*